Supreme Court, U.S.
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NO. _____

UNITED STATES SUPREME COURT

OCTOBER, 1994, TERM

HELEN CAVER
Petitioner

VERSUS

JOE GERACE
ADMINISTRATOR, LOUISIANA DEPARTMENT
OF EMPLOYMENT SECURITIES, ET AL
Respondents

ON APPLICATION FOR
WRITS OF CERTIORARI AND/OR
WRITS OF REVIEW OF THE
LOUISIANA STATE SUPREME COURT
AND APPEAL OF THE SECOND CIRCUIT,
STATE OF LOUISIANA

PETITION FOR WRITS OF CERTIORARI AND/OR WRITS OF REVIEW

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QUESTIONS PRESENTED

1. Can a state deny its citizen due process by using an informal pre-deprivational hearing where the conclusions of the hearing officer are considered final on a substantive issue and, therefore, binding on the court.

2. Can an informal pre-deprivation hearing be utilized by the State to Constitutionally deprive the employee of their unemployment benefits without any standardized rules of evidence or procedure.

3. Can a state court use technical rules of evidence to deprive an employee of unemployment compensation benefits by reliance on the ruling of an informal pre-deprivational hearing that ignored the rules of evidence and instructed the employee to waive the assistance of an attorney.

4. Can a state appeals court universally deprive unemployed plaintiff's due process by refusing to review the factual substantive conclusions of the pre-deprivational hearing which were based on hearsay, by stating that the admission and use of the hearsay was not objected to and, therefore, waived by the unrepresented plaintiff at the pre-deprivational hearing.

PARTIES TO THE PROCEEDING

A. Petitioner

1. Helen Caver

B. Respondent

1. Joe Gerace, Administrator, Louisiana Department of Employment Securities

2. Bobby L. Culpepper

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3. Can a state court use technical

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employee of unemployment compensation benefits by reliance on the ruling of an informal pre-deprivational hearing that ignored the rules of evidence and instructed the employee to waive the assistance of an attorney.

4. Can a state appeals court universally deprive unemployed plaintiff's due process by refusing to review the factual substantive conclusions of the pre-deprivational hearing which were based on hearsay, by stating that the admission and use of the hearsay was not objected to and, therefore, waived by the unrepresented plaintiff at the pre-deprivational hearing.

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OPINIONS BELOW

This is an action by the plaintiff/employee, Helen Caver, to collect her unemployment benefits from the State of Louisiana. Ms. Caver was employed with attorney, Bobby L. Culpepper in Jonesboro, Louisiana.

After some years of employment with Mr. Culpepper, a change in the circumstances of her employment made it impossible for her to continue her employment with Mr. Culpepper. Ms. Caver, therefore, filed for her unemployment benefits.

As is more fully discussed later, Ms. Caver was denied her unemployment benefits at the pre-deprivational hearing by a hearing officer who based his decision of denial on blatant

hearsay offered by the employer, which would have otherwise been inadmissible in a court of law, as the basis of its factual conclusions.

Ms. Caver was not represented by counsel at the pre-deprivation informal hearing because the notice at the hearing had stated that "You may be represented by an attorney or have witnesses at the hearing. It is not required."

After being denied her unemployment benefits, she contacted an attorney, who filed suit in the Third Judicial District Court for a review of the pre-deprivational hearing. Ms. Caver through her attorney, timely asked the Louisiana State Third Judicial District Court to

review the case by de novo review since the conclusions of the hearing officer were based upon hearsay.

The state district court denied the plaintiff due process of law by accepting the factual conclusions reached by the hearing officer, which were based upon hearsay, as final. The District Court, refusing to review the factual conclusions of the hearing officer, stated that Ms. Caver (who appeared at the hearing pro se) had waived her objection by failing to object to the admission and use of hearsay at the informal pre-deprivational hearing.

An appeal was timely perfected to the Louisiana Second Circuit Court of Appeal. The Court of Appeal rendered

an Opinion (designated "Not For Publication") holding that, because the plaintiff's failure to object to the admittance of the hearsay evidence at the informal pre-deprivational hearing, she waived any right to complain to the court. This Second Circuit Appellate opinion was in keeping with the same circuits earlier opinion in Chalik v. Gerace, 459 So.2d 82 (La. App., 2d Cir. 1984) where the court had also stated that the unrepresented employee, Mr. Chalik, had waived his right to raise the hearsay objection before the court since he had failed to raise it in the pre-deprivation hearing.

The Louisiana State Supreme Court denied plaintiff's Application

for Writs of Certiorari and/or Writs of Review to review the decision of the Court of Appeals decision on January 27, 1995, thus affirming the lower court decision. Plaintiffs' only remedy for redress is now with the U.S. Supreme Court.

JURISDICTIONAL STATEMENT

The Louisiana Supreme Court denied Plaintiff's Application for Writs on January 27, 1995.

Thus, pursuant to Federal Rules of Civil Procedure, 28 Section 1257, your petitioner, Helen Caver, seeks review of the Louisiana Supreme Court's decision denying the Application for Writs, thereby affirming the Appeal Court's erroneous decision denying plaintiff employment compensation benefits.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment 14:

... No State shall...deprive any person of life, liberty, or property, without due process of law;...

42 U.S.C. Sec. 1983:

Every person who, under color of any statute...of any State... subjects... any citizen of the United States...to the deprivation of any rights...secured by the Constitution and laws, shall be liable to the party injured in an action at law,...

LSA-R.S. 23:1601 (1):

An individual shall be disqualified for benefits:

(1) If the administrator finds that he has left his employment from a base period or subsequent employer without good cause attributable to a substantial change made to the employer...

LSA-CE Art. 801 (C):

"Hearsay" is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted.

STATEMENT OF THE CASE

Following the death of her husband, Ms. Caver sought a university degree at Northwestern State University in Natchitoches, Louisiana in order to better support her minor son. While attending night classes at the University for paralegal studies, Ms. Caver took a job with attorney, Bobby L. Culpepper in Jonesboro, Louisiana. At that time, Ms. Caver was living at Saline, Louisiana, which was approximately half-way between her work place and her school. The first year of working for Mr. Culpepper, Ms. Caver's time was spent in working eight (8) hours per day in the office at Jonesboro and attending classes several nights a week at Natchitoches.

She had to reduce her lunch break from one (1) hour to 30 minutes so that she could leave work early and be at school on time. Upon graduation, she moved to Jonesboro, one block from Culpepper's office, to be near her work place.

Upon re-marring, in February of 1992, Ms. Caver approached Mr. Culpepper in his office for permission to transfer to his satellite law office in Ruston, Louisiana, which was approximately 29 miles away. Mr. Culpepper agreed to transfer Ms. Caver to the satellite office in Ruston. **NOTE**: At the time of the agreement, Ms. Caver and Mr. Culpepper were the only persons present in the office and the only two parties to the

communication.

Ms. Caver moved and began working in the Ruston satellite office on March 3, 1992. On December 4, 1992, nine months later, Mr. Culpepper gave Ms. Caver a memo that stated that Ms. Caver must return to the Jonesboro Office to work. On December 29, 1992, Ms. Caver, who earned $7.55 per hour, told Mr. Culpepper that she could not commute 58 miles per day to the main office in Jonesboro, given the fact that she had moved her residence to Ruston. Mr. Culpepper insisted that she return to the main office in Jonesboro with no offer of compensation for moving expenses. Ms. Caver was, therefore, forced to leave her job.

On January 4, 1993, Ms. Caver applied for employment compensation benefits, since the Louisiana Unemployment Law states that a job change which is attributable to the employer, that makes the job cost prohibitive to the employee, is compensable under said law. The Louisiana Employment Security Administration denied benefits, stating that Ms. Caver quit her job without good cause. Ms. Caver applied for a pre-deprivational hearing before an Administrative Law Judge. The Notice sent by the State to the plaintiff to appear at the pre-deprivational hearing before the Administrative Law Judge stated that Ms. Caver "may be represented by an

attorney or have witnesses at the hearing, but it is not required." See **Notice To Appear For Hearing**, Appendix A-22.

Note: The Notice does not mention that one must object at the hearing or, failing to do so, waives the right to complain on appeal. In fact, the Notice states that written documents should be mailed as soon as possible to the Judge or brought with you to the hearing.

At the informal pre-deprivational hearing before the Administrative Law Judge (ALJ), the primary issue before the hearing was whether a conversation which took place between the employee, Ms. Caver and the employer, Mr. Culpepper in February of 1992 amounted

to a change in the nature of Ms. Caver's employment.

The only two people who had first hand knowledge of the conversation was the two individual, Ms. Caver and Mr. Culpepper. Ms. Caver testified that Mr. Culpepper had made a permanent change in her job duties by moving her to the firms satellite office some 29 miles away.

Mr. Culpepper, the employer, was not present at the informal pre-deprivational hearing. He did, however, submitt an affidavit at the hearing by his attorney. In the affidavit, Mr. Culpepper stated that, in the February 1992 conversation, he had instructed Ms., Caver that the move to the satellite office was

temporary and not a permanent change in her job description, even though Ms. Caver had moved her home to Ruston near the satellite office following the conversation.

The employer's attorney, Teresa Carroll, is also the employer's daughter and office manager. Ms. Carroll testified at the pre-deprivational hearing as to what her father had "told" her about the February, 1992 conversation regarding the nature of Ms. Caver's employment agreement.

The hearing officer at the pre-deprivational hearing, took the affidavit and Ms. Caver's testimony about what her father had told her about the February, 1992 hearing as

factual. He refused to believe the evidence of Ms. Caver who was the only party to the conversation in the hearing room.

The affidavit and statements by Ms. Carroll as to what her father "told" her about the February, 1992 are both obviously blatant hearsay. Hearsay is defined as "an out of court statement offered as the truth of the matter asserted." LSA: C.E. 801

The Administrative Law Judge, at the pre-deprivation hearing, accepted the affidavit of the employer, Mr. Culpepper, who was not present at the hearing, as evidence to deny Ms. Caver benefits. Ms. Caver was not represented by an attorney at the pre-deprivation hearing.

Ms. Caver, who was now unemployed and without any unemployment benefits, managed to find an attorney to represent her to appeal the erroneous pre-deprivation hearing opinion. Suit was filed in the Third Judicial District Court for judicial review of the Administration's decision. The plaintiff's petition stated that Mr. Culpepper was not present at the hearing and the affidavit submitted by him and the testimony of Ms. Carroll about the agreement between Mr. Culpepper and Ms. Caver was hearsay evidence and the Administrative Law Judge was in error in making his decision based upon said evidence.

The State of Louisiana joined the

plaintiff stating that the administrative decision was erroneous and that plaintiff should be awarded benefits. However, the District Court affirmed the Administrative Judge's decision stating that Ms. Caver "waived" her right to object before the court.

Timely appeal was made to the Second Circuit Court of Appeal and the State of Louisiana, through its Administrator of the Department of Employment Security, filed a responsive brief joining the plaintiff in the allegations that the plaintiff was forced to leave her job due to the change in employment that was attributable to the employer and she was entitled to benefits. Judgment

was rendered on October 26, 1994, in an unpublished Opinion, affirming the District Court Judgment. The Court further stated that at the pre-deprivation hearing, Ms. Caver (who was unrepresented by counsel) waived any right to complain on appeal to the hearsay evidence by not objecting at the pre-deprivation hearing. The Appellate Court first stated that the second hand evidence presented was not hearsay. Oddly enough, the Court did not cite any authority upon which it based this ruling. More importantly, the Court stated that since Ms. Caver failed to object to the admission of the testimony at the pre-deprivation hearing, where she was not represented by an attorney, she therefore, waived

any right to complain on appeal. (**NOTE:** The Notice by the State to appear at the pre-deprivation hearing does not inform the plaintiff that she must object at the hearing or waive her right to complain on appeal. In fact, she is told that it is unnecessary to bring a lawyer). Further, the Unemployment Code specifically says that the hearing will be "informal".

Application for Writs was made to the Louisiana Supreme Court which was denied on January 27, 1995. This is particularly egregious since the Louisiana Supreme Court also denied Writs from another Appellate Circuit when that Circuit had also denied the employee benefits because he refused

to object to the hearsay evidence at the pre-deprivation hearing and was unrepresented by counsel.

This State's action by the lower courts and the Louisiana Supreme Court, in holding that hearsay evidence must be objected to at the pre-deprivation hearing or the right is waived is unjust and a complete denial of due process.

ARGUMENT

1. Can a state deny its citizen due process by using an informal pre-deprivational hearing where the conclusions of the hearing officer are considered final on a substantive issue and, therefore, binding on the court.

Under State law, when an employee has been forced to quit a job because of changes made by the employer and those changes become cost prohibitive to the employee, the employee has just cause for quitting and is entitled to the employment compensation benefits. **LSA-R.S. 23:1601.** McGraw V. Director of Postal Data Center, 319 So.2d 797,799 (La. App. 1 Cir. 1975); Boudreaux V. Louisiana Board of Review, Dept. of Employment Sec. 374 So.2d 1182 (LA. 1979); Guillory V.

Administrator of Louisiana Office of Employment Sec., 525 So.2d 1197 (La. App. 5 Cir. 1988).

At the informal pre-deprivational hearing before the Administrative Law Judge (ALJ), the primary issue before the hearing was whether a conversation which took place between the employee, Ms. Caver and the employer, Mr. Culpepper in February of 1992 amounted to a change in the nature of Ms. Caver's employment.

The only two people who had first hand knowledge of the conversation were the two individuals, Ms. Caver and Mr. Culpepper. Ms. Caver testified that Mr. Culpepper had made a permanent change in her job duties by moving her to the firm's satellite

office some 29 miles away.

Mr. Culpepper, the employer, was not present at the informal pre-deprivational hearing. He did, however, submit an affidavit at the hearing by his attorney. In the affidavit, Mr. Culpepper stated that, in the February 1992 conversation, he had instructed Ms. Caver that the move to the satellite office was temporary and not a permanent change in her job description, even though Ms. Caver had moved her home near the satellite office following the conversation.

The employer's attorney, Teresa Carroll, is also the employer's daughter and office manager. Ms. Carroll testified at the pre-deprivational hearing as to what her

father had "told" her about the February, 1992 conversation regarding the nature of Ms. Caver's employment agreement.

The hearing officer at the pre-deprivational hearing, took the affidavit and Ms. Caver's testimony about what her father had told her about the February, 1992 hearing as factual. He refused to believe the evidence of Ms. Caver who was the only party to the conversation in the hearing room.

The affidavit and statements by Ms. Carroll as to what her father "told" her about the February, 1992 are both obviously blatant hearsay. Hearsay is defined as "an out of court statement offered as the truth of the

matter asserted". See LSA: C.E. 801.

The District court and the Appeal Court ruled that since Ms. Caver failed to object at the pre-deprivational hearing to the use of hearsay as the basis for the conclusion, she waived any right to complain at the court level.

The decision by the Administrative Law Judge to ignore the rank hearsay nature of the testimony of Teresa Carroll was a "final" decision which deprived the applicant of her constitutional right to due process to have the evidence excluded by a court. She was not informed of the requirement that she make a contemporaneous objection to hearsay and, therefore, the Court became bound

by the ruling.

Deprivation of judicial review on such a critical issue is a violation of the applicant's right to due process of law. The applicant was deceived by the informal quality of the administrative review and was ignorant of the finality achieved by its ruling. The judicial review of administrative rulings becomes meaningless if the courts are bound by evidentiary rulings made at the hearing stage.

In Ogburn V. City of Shreveport, 614 So.2d 748, 753 (La. App. 2 Cir. 1993), the Court stated:

> **In order for due process rights to be effectively waived, whether is civil or criminal matters, the waiver must be made voluntarily, intelligently and**

> knowingly. Absent an effective waiver, courts will not presume that a person acquiesces in the loss of fundamental rights. St. Julien V. South Central Bell Telephone Co., 433 So.2d 847 (La. App. 3d Cir. 1983).

The United Stated Constitution, Amendment 14 states in pertinent part:

> ...No State shall...deprive any person of life, liberty, or property, without due process of law;...

Due process of law under Amendment 14 means that one must be put on notice of such right, and that in order to waive the right, the waiver must be voluntarily, knowingly and intelligently done. This Court, showing the purpose of Amendment 14, stated in Daniels v. Williams, 106 S.Ct. 662, 665 (1986):

> The Due Process Clause of the Fourteenth Amendment

> provides: 'Nor shall any State deprive any person of life, liberty or property, without due process of law.' Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property. . (Cites omitted)....
>
> The Fourteenth Amendment is a part of a Constitution generally designed to allocate governing authority among the Branches of the Federal Government and between that Government and the States, and to secure certain individual rights against both State and Federal Government.

In Board of Regents of State Colleges V. Roth, 92 S.Ct. 2701, 2708 (1972), this Court stated:

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests-- property interests-- may take many forms.
>
> Thus, the Court has held that a person receiving welfare

benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Goldberg V. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287....

Certain attributes of "property" interests protected by procedural due process emerge from these decision. To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is the purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state

> law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

The lower court in Maxey V. Smith, 823 F. Supp. 1321, 1330 (N.D. Miss. 1993), citing Supreme Court Case of 96 S. Ct. 2074, 2077, stated:

> A property interest in employment sufficient to invoke procedural due process protection of notice and an opportunity to be heard need not be embodied in a formal contract or a tenure system. (Cites omitted).

The Maxey Court further stated at Page 31:

> The concept of "substantive" due process is "the notion that the Due Process Clause-- in addition to setting procedural minima for deprivations of life, liberty, or property--bars outright, 'certain government actions regardless of the fairness of the procedures used to implement them.'"...106 S.Ct. 662, 665....Substantive due process is violated by state

conduct that offends traditional notions of fairness and decency....

In the present case, the Court, which is an arm of the State, erred in its ruling when it accepted the hearsay evidence of the affidavit and hearsay evidence by Ms. Carroll. More importantly, the ruling that the plaintiff waived her right to complain because she did not object at the hearing certainly violates due process and offend the traditional notions of fairness and decency. Accepting an affidavit from the employer, which could not be cross-examined, is hearsay. Accepting the testimony of Ms. Carroll of what someone "told" her as the truth of the matter is also hearsay.

We would note for the record that the Second Circuit apparently believes this to be the proper rule of law and is universally applying this deprivation. (e.g. in Chalik v. Gerace, 459 So.2d 82, 85 (La. App., 2d Cir. 1984) the appellate court stated that the failure of the employee, Mr. Chalik, to object to the hearsay nature of evidence was a waiver of the objection.

2. Can an informal pre-deprivation hearing be utilized by the State to Constitutionally deprive the employee of their unemployment benefits without any standardized rules of evidence or procedure.

This Court stated in Curtis Publishing Company V. Butts, 87 S.Ct. 1975, 1985 (1967);

> ...we must first, determine whether Curtis has waived its

> right to assert such arguments by failing to assert them before trial. As our dispositions of Rosenblatt V. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597, objections may be waived by a failure to raise them at a proper time....,but an effective waiver must, as was said in Johnson V. Zerbet, 304 U.S. 458..., be one of a "known right or privilege."

The Notice from the State states as follows (See Appendix A-26):

> EXHIBITS
> Exhibits (written documents) which you want included in the hearing should be mailed as soon as possible to the Judge or brought with you to an in-person hearing. In matters involving health, a doctor's certificate should be sent to the Judge. Do not bring or mail the Judge a statement of your case. During the hearing you may refer to notes, but you will not be allowed to read your testimony.

No where does the Notice state that the claimant must object to admitting the evidence or waive her

right to complain on appeal. Since the Notice states that the documents could be mailed to the Judge prior to the hearing, in that instance, the claimant could not object prior to the admittance anyway. If this court determines that the rules of evidence should be followed at the informal hearing, then under those same rules of evidence, this court must rule that the defendant's affidavit and defendant's daughter's testimony are hearsay evidence and the court cannot base its decision upon said evidence. The Court in D. H. Overmyer Co., Inc. Of Ohio V. Frick Company, 92 S.Ct. 775, 782 (1972) stated:

> **The due process rights to notice and hearing prior to a civil judgment are subject to**

waiver. In National Equipment Rental, Ltd. V. Szukhent, 375 U.S. 311,...the Court observed:

> "It is settled...that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether."
>
> This, of course, parallels the recognition of waiver in the criminal context here personal liberty, rather than a property right, is involved....Miranda V. Arizona, 384 U.S. 436....

It is clear that the Notice by the State does not inform the plaintiff that she must object to anything at the hearing or, failing to do so, thereby waives her rights.

3. Can a state court use technical rules of evidence to deprive an employee of unemployment compensation benefits by reliance on the ruling of

an informal pre-deprivational hearing that ignored the rules of evidence and instructed the employee to waive the assistants of an attorney.

The Notice states on the second page:

> REPRESENTATIVES
> You <u>may</u> be represented by an attorney or have witnesses at the hearing. It is not required. It is your responsibility to notify the Appeals Tribunal and have your representatives and/or witnesses at the number at which you will be called or with you at an in-person hearing. FEES FOR REPRESENTATION MUST BE APPROVED BY THE ADMINISTRATOR OF THE LA. DEPT. OF LABOR.

In a court of law, one needs an attorney who is aware of the rules of evidence and knows that one must object at the proper time or waive the right to do so on appeal. However, the pre-deprivation hearing before an Administrative Law Judge is informal by virtue of the Notice and ordinary

people, who are not trained in the law, do not know that they must object or lose their right to object in court. Even though Ms. Caver works at a law firm, she is not an attorney and has no courtroom experience. An attorney would be required to make an informed consensual waiver of her legal rights. The informal hearing is not a courtroom requiring such formality and the Notice says that an attorney is not required.

In Miami Tele-Communications, Inc. V. City of Miami, 743 F. Supp. 1573, 1576 (S.D. Fla. 1990), the Appeal Court citing 92 S.Ct. 775, 782, 87 S.Ct. 1975, 1986 and 57 S.Ct. 809 stated:

Although the constitutional

> right to due process may be waived, the waiver of a constitutional right must be voluntary, knowing, and intelligent....
>
> Before considering the validity of a waiver, however, the court must make a threshold determination as to the existence of a waiver.... We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver....A waiver of constitutional rights in any context must, at the very least, be clear....Thus,, a waiver must be established by "clear" and "compelling" evidence....and courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights.

The Notice from the State of Louisiana fails miserably to show that the plaintiff, Ms. Caver, was put on notice by "clear and compelling" evidence and the State Courts failed

to "indulge every reasonable presumption" against a waiver of the plaintiff's fundamental constitutional rights.

In Augustus v. Roemer, 771 F. Supp. 1458, 1471 (E.D. La. 1991) the State of Louisiana was charging a 2% fee on bails posted by prisoners to be released into certain Parishes. The Court stated:

> ...We fail to see, though, how requiring a bond to be posted and then charging a "fee" for safekeeping confers a benefit on anyone but the state. And, as to sending out notices, due process requires such notices be sent prior to hearings; therefore, charging someone for receiving due process is not proper regardless. (Emphasis added).

Ms. Caver certainly was not given notice by the State, but, in fact, was

told that an attorney was not required at the pre-deprivation hearing.

4. Can the state deny the unemployed plaintiff due process if it opines that the conclusions reached at a pre-deprivational hearing on a substantive issue are to be considered final unless the worker, who was represented by counsel, waived that right by not objecting to the conclusions at the pre-deprivational hearing.

LSA-CE, Art. 801 (C) states:

> **"Hearsay" is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted.**

There are two "pieces" of hearsay used by the pre-deprivation hearing Administrative Law Judge as basis for the opinion. The first was an affidavit purporting to be that of the employer, Mr. Culpepper. The second

was testimony by Ms. Carroll as to the validity of an employment agreement reached between Ms. Caver and Mr. Culpepper when Ms. Carroll had no first hand knowledge and was actually 150 miles away. Mr. Culpepper was not present at the hearing to testify and his affidavit, therefore, could have only been considered hearsay evidence. While there are exceptions to the hearsay rule, the said affidavit is not one of them.

At the time of the agreement between Mr. Culpepper and Ms. Caver, they were the only persons present to witness the conversation. However, Ms. Carroll, Mr. Culpepper's daughter, testified that she had personal knowledge of the conversation even

though she was 150 miles away in Baton Rouge. However, the Courts have stated that Ms. Carol's testimony was not hearsay evidence because she "maintained continued contact with her father." Supposedly, this meant when Mr. Culpepper supposedly told her. In order for the testimony to be excluded from hearsay, Ms. Carroll would have to have maintained **constant** contact or have been present at the time of the conversation. Ms. Carroll testified, **" I communicated with him on a weekly basis while I was at LSU Law School".** (Hearing Transcript, Page 32, Appendix A-28). If Ms. Carroll communicated with her father on a weekly basis and she was not present at the agreement, then she could have

only known of what her father "told" her. The testimony shows that Ms. Carroll was not privy to the conversation between Ms. Caver and Mr. Culpepper and could have only known of it because Mr. Culpepper related it to her at a later time.

The stated testimony is in direct contradiction to the employer's affidavit which stated that the relocation of the Ruston office to a smaller office allowed no room for a paralegal.

The Court in Louisiana's Third Circuit ruled on the very issue of this type of hearsay evidence in an employment compensation benefits case in **Weatherly Laboratories V. Administrator, Office of Employment**

Security, Et Al, (La. App. 3 Cir. 1994). This case was reported shortly after the plaintiff, Ms. Caver, applied or Writs to the Louisiana Supreme Court and the Court refused to grant Writs. In the **Weatherly** case, the employer accused the employee of violating a company rule regarding confidentiality of payroll data. The Office of Employment Security contacted the president of the company and obtained an oral statement and required him to submit written statements from the employees who witnessed the misconduct. The benefits were denied. The employee denied all allegations and a hearing was set. At the hearing, the President of the Company presented the

written statements of the other employees and his own testimony of what he had been told. The Administrative Law Judge reversed the decision stating that the evidence presented was hearsay evidence. The employer filed suit in District Court which denied the employer relief. The employer appealed to the Third Circuit, contending that it had been denied due process of law because the Notice stated that he could have an Attorney and witnesses present, but it was not necessary, and the President therefore, concluded that the statements used at the original Agency determination were sufficient. The Court ruled as follows:

We conclude the notice is

> inadequate to satisfy the constitutional due process notice requirements. Not only is the phrase 'It is not required' misleading, but it is untrue as it applies to witnesses. The burden of proof rests with the employer to prove misconduct, and at the administrative law judge level, that burden is not overcome by hearsay evidence or ex parte statements. (Emphasis added).

In the case at Bar, the burden of proof upon the employer to show that the plaintiff's initial agreement to move to the satellite office was on a temporary basis cannot be overcome by an written affidavit nor the hearsay testimony of a person who was not present at the time of the agreement. Neither can the Courts, which is an arm of the State, declare that without objection of an unrepresented plaintiff at the pre-deprivation

hearing, she waived any right to complain on appeal when she was not put on notice of the right or waiver.

The Court's erroneous ruling was based upon: 1) the affidavit of the employer, when he was not present to be cross examined; 2) Ms. Carroll's testimony that the move to Ruston was temporary and on a trial basis. However, she testified that it was **her** suggestion to Mr. Culpepper when he informed her of the agreement for Ms. Caver to move. There was nothing on the Notice from the State to inform the plaintiff that the employer was alleging misconduct so that she might prepare for a defense. Therefore, any evidence of misconduct by Ms. Carroll should not have been allowed at the

hearing.

4. Can a state appeals court universally deprive unemployed plaintiff's due process by refusing to review the factual substantive conclusions of the pre-deprivational hearing which were based on hearsay, by stating that the admission and use of the hearsay was not objected to and, therefore, waived by the unrepresented plaintiff at the pre-deprivational hearing.

The Second Circuit apparently believes this to be the proper rule of law and is universally applying this deprivation. (e.g. in Chalik v. Gerace, 459 So.2d 82, 85 (La. App., 2d Cir. 1984) the appellate court found that the failure of the employee, Mr. Chalik, to object to the hearsay nature of evidence was a waiver of the objection.

CONCLUSION

The States sent Notice to the plaintiff to appear at the pre-deprivation administrative hearing before the Administrative Law Judge that stated an "Attorney is not required". The Administrative Law Judge based his opinion on hearsay evidence. When the plaintiff sought her constitutional court review of the hearings, the court affirmed the Administrative Law Judge's decision by saying that Ms. Caver's failure to object was a waiver. However, because the State failed to put plaintiff on notice that she would waive her right to complain on appeal if she did not object at the hearing, the plaintiff

has been denied due process according to Amendment 14 of the United States Constitution.

WHEREFORE, your petitioner prays that a Writ of Certiorari and/or Writ of Review issue herein, that upon due consideration, the Judgment of the Court of Appeals rendered on October 26, 1994, be duly reversed and that this Honorable Court render judgment in favor of plaintiff, ruling that she has been denied due process under the laws of the State of Louisiana and the United States and order that the plaintiff, Helen Caver, be awarded benefits under the laws of the State of Louisiana. Alternatively, that this case be remanded for trial on the merits.

Respectfully submitted,

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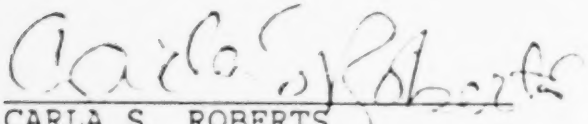
By: 

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LOUISIANA BAR ROLL NO. 19388

Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that I have this date served upon counsel for the opposing parties in the foregoing matter with a copy of the **APPLICATION FOR WRITS OF CERTIORARI AND/OR WRITS OF REVIEW** on behalf of Plaintiff, **Helen Caver**, by placing same in the United States Mail, postage prepaid this 26th day of April, 1995, addressed as follows:

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